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Chapter V
Identification of customary international law

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Chapter V
Identification of customary international law

A. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Mr. Michael Wood as Special Rapporteur.[1] At the same session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653).[2] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[3]

2. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum by the Secretariat on the topic (A/CN.4/659).[4] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law". At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/672).[5]

3. Following its debate on the second report of the Special Rapporteur, the Commission, at its 3227th meeting, decided to refer draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. At the 3242nd meeting of the Commission, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session.

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/682). The Commission considered the report at its 3250th to 3254th meetings, from 13 to 21 May 2015.

5. At its 3254th meeting, on 21 May 2015, the Commission referred the draft conclusions contained in the third report of the Special Rapporteur, to the Drafting Committee. At the ... meeting of the Commission, on ... 2015, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the ... draft conclusions provisionally adopted by the Drafting Committee at the sixty-fifth and sixty-sixth

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[1] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314).

[2] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157–202.

[3] *Ibid.*, para. 159.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 64.

[5] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 135.

sessions. The report, together with the draft conclusions, was presented for information only at this stage, and is available on the Commission website.[6]

1. Introduction by the Special Rapporteur of the third report

6. When presenting his third report, the Special Rapporteur indicated that it sought to cover issues that were raised in 2014 regarding the two constituent elements ("a general practice" and "accepted as law (*opinio juris*)") as well as new issues such as particular custom and the persistent objector. The report proposed additional paragraphs to three of the draft conclusions proposed in the second report, as well as five new draft conclusions, which fell into two new parts (Part five "Particular form of practice and evidence" and Part six "Exceptions to the general application of rules of customary international law").

7. The report comprised nine sections. The first section constituted an introduction recalling the history of the topic and, in particular, the work done during the previous session by the Commission, as well as the debate on the topic in the Sixth Committee in 2014. Section II of the report returned to the relationship between general practice and *opinio juris* (draft conclusion 3 [4], paragraph 2).[7] Section III dealt with the role of inaction as a form of practice and/or evidence of acceptance as law (draft conclusion 11, paragraph 3).[8] Other particular forms of practice and evidence were addressed under Sections IV and V: Section IV examined the role of treaties and resolutions of international organizations and conferences (draft conclusions 12 and 13 respectively), and two subsidiary means for the determination of rules of customary international law, namely judicial decisions and writings (draft conclusion 14), were considered in Section V.[9] Section VI addressed the relevance of international

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[6] Located at www.un.org/law/ilc.

[7] Draft conclusion 3 [4], paragraph 2, read as follows:

> **Draft conclusion 3 [4]**
> ***Assessment of evidence for the two elements***
>
> ...
>
> 2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element.

[8] Draft conclusion 11, paragraph 3, read as follows:

> **Draft conclusion 11**
> ***Evidence of acceptance as law***
>
> ...
>
> 3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

[9] Part five read as follows:

> **Part five**
> **Particular forms of practice and evidence**
>
> **Draft conclusion 12**
> ***Treaties***
>
> A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:
>
> (a) at the time when the treaty was concluded, codifies an existing rule of customary international law;
>
> (b) has led to the crystallization of an emerging rule of customary international law; or
>
> (c) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.
>
> **Draft conclusion 13**
> ***Resolutions of international organizations and conferences***
>
> Resolutions adopted by international organizations or at international conferences may, in

organizations (draft conclusion 4 [5], paragraph 3).[10] Finally, sections VII and VIII of the report concerned, in different ways, the application *ratione personae* of rules of customary international law, to which Part six of the draft conclusions was devoted. Part six comprised two draft conclusions, on particular custom and on the persistent objector respectively (draft conclusions 15 and 16).[11]

8. In his introduction, the Special Rapporteur expressed his appreciation for the input and support he had received in preparing the third report, as well as for the written submissions received on the topic from several Governments. He indicated that he had sought to complete the set of draft conclusions to be covered in the final product of the topic, and invited members to suggest any issues that had been overlooked. He highlighted the interconnections between the topic and other topics that had been, and were, on the International Law Commission's agenda, and affirmed that the Commission's work was to be seen as a whole.

9. The Special Rapporteur recalled that, further to the request made by the Commission, he had returned to the relationship between general practice and *opinio juris* in the third report. He concluded therein that, in seeking to ascertain whether a rule of customary international law had emerged, it was necessary in every case to consider and verify the existence of each element separately and that that generally required an assessment of different evidence for each element. Another point was that in identifying whether a rule of customary international law exists, what mattered was that both elements were present rather than their temporal order. Finally, the report indicated that there could be a difference in application of the two-element approach in different fields of international law and that, in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, could be more relevant than in others.

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some circumstances, be evidence of customary international law or contribute to its development, they cannot, in and of themselves, constitute it.

Draft conclusion 14
Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

[10] Draft conclusion 4 [5], paragraph 3, read as follows:

Draft conclusion 4 [5]
Requirement of practice

...

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

[11] Part six read as follows:

Part six
Exceptions to the general application of rules of customary international law

Draft conclusion 15
Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

2. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by each of them as law (*opinio juris*).

Draft conclusion 16
Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.

10. The Special Rapporteur also revisited the question of inaction, in particular its possible contribution to a general practice and possible role as evidence of acceptance as law. He stressed that, despite the importance of inaction for establishing general practice in some cases, the circumstances in which inaction could be relevant were not always obvious. The Special Rapporteur added that inaction could serve as evidence of *opinio juris* when the circumstances called for some reaction. This entailed that the State concerned had to have had actual knowledge of the practice in question or that the circumstances had to have been such that it was deemed to have had such knowledge, and that the inaction needed to have been maintained over a sufficient period of time.

11. The third report considered certain particular forms of practice and of evidence of *opinio juris*, namely treaties and resolutions of international organizations and conferences, given that they are frequently resorted to in the identification of customary international law. The Special Rapporteur noted that similar considerations could also apply to other written texts, such as those produced by the International Law Commission. The report sought to advise caution when considering whether or not those texts may be relevant for the identification of customary international law and to reiterate that all the surrounding circumstances needed to be considered and weighed. In any event, the written texts could not, in and of themselves, constitute customary international law.

12. Regarding the relevance of treaties and treaty-making, the report recalled three ways in which such written texts could relate to customary international law: codification of existing law, crystallization of emerging law, or as the origin of new law. The report also addressed the question of the practice of States parties to multilateral conventions, as well as the possible relevance of bilateral treaties.

13. The report also dealt with the issue of the relevance of resolutions adopted by States at international organizations or international conferences as State practice or as evidence of *opinio juris*. The Special Rapporteur acknowledged the important role such resolutions could play, in certain circumstances, in the formation and identification of customary international law. They could not, in and of themselves, create customary international law, but could provide evidence of existing or emerging law and indeed give rise to practice that may lead to the formation of a new rule. In such a process of assessment, the particular wording used in a given resolution was of critical importance, as were the circumstances surrounding the adoption of the resolution in question.

14. The report also proceeded to consider two 'subsidiary', albeit significant, means for the determination of rules of customary international law: judicial decisions and writings. By judicial decisions, the report referred to both decisions of national courts and decisions of international courts and tribunals. The importance of the latter was underlined. Decisions of national courts could also be influential, but had to be approached with some caution. The report also recognized that writings remained a useful source of information and analysis for the identification of rules of customary international law, although it was important to distinguish between those that were intended to reflect existing law (*lex lata*) and those that were put forward as emerging law (*lex feranda*).

15. As regards the practice of international organizations as such, the report recalled the conclusion reached last year that, in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law. The Special Rapporteur emphasized the importance of the distinction between the practice of States within international organizations and that of the international organizations themselves. He also highlighted the importance of distinguishing between the practice of the organization that related to the internal

operation of the organization and the practice of the organization in its relations with States and others. In addition, it was proposed that the conduct of non-State actors other than international organizations be addressed in the draft conclusions.

16. The report turned to the category of "particular custom", a term which was intended to cover, as explained by the Special Rapporteur, what were sometimes referred to as "special", "regional", "local" or "bilateral" customary rules. The Special Rapporteur stressed that, given the nature of particular custom as binding only on a limited number of States, it was essential to identify clearly which States had participated in the practice and accepted it as law. In order to determine the existence of such a custom, it was therefore necessary to ascertain whether there was a general practice among the States concerned that was accepted by each of them as law (*opinio juris*).

17. The report also addressed the persistent objector rule, whereby a State which had persistently objected to an emerging rule of customary international law, and maintained its objection after the rule had crystallized, was not bound by it. The Special Rapporteur emphasized that the rule was well established in jurisprudence, in the previous work of the Commission, and in the literature. The Special Rapporteur stressed the importance of addressing the rule, among other things in order to clarify its stringent requirements.

2. Summary of the debate

(a) General comments

18. The Members of the Commission reiterated their support for the two-element approach followed by the Special Rapporteur. There was general agreement that the outcome of the topic should be a set of practical and simple conclusions, with a commentary, aiming at assisting practitioners in the identification or rules of customary international law. Caution was advised against oversimplification and it was suggested that the draft conclusions would benefit from further specification.

19. An exchange of views took place as to the scope of the topic. Some Members of the Commission indicated that the topic should deal more in depth with the formation of rules of customary international law. According to another view, the draft conclusions should be restricted to the question of the identification of such rules and should not deal with the question of their formation as such. It was indicated, in this respect, that the topic was concerned with the identification of a customary rule at a precise time, without prejudice to the future evolution of this rule.

(b) Relationship between the two constituent elements

20. Some members of the Commission supported the conclusion that, although the two elements always needed to be present, there could be a difference in application of the two-element approach in different fields or with respect to different types of rule. It was stated, however, that a uniform standard had to be upheld regarding all different fields. Some members of the Commission indicated that the two elements had not been applied consistently and that the topic would benefit from further exploration of the respective weight of the two elements in different fields.

21. Support was expressed for the conclusion that each element was to be separately ascertained and that that generally required an assessment of specific evidence for each element. Several members of the Commission stressed that the separate assessment of the two requirements did not mean that the same material could not be evidence of both elements.

22. As regards the temporal relationship between the two elements of customary rules, a view was expressed that practice should precede *opinio juris*, while, according to another view, there was no necessary causality between the two elements.

(c) Inaction as practice and/or evidence of acceptance as law

23. While the analysis provided for in the third report on the relevance of inaction for the identification of rules of customary international law was generally welcomed, a number of members of the Commission pointed out the practical difficulty of qualifying inaction for that purpose. Several members expressed the need to clarify the specific circumstances under which inaction was relevant, especially in the context of the assessment of acceptance as law. It was suggested that the specific criteria to be taken into account to qualify inaction be indicated in the text of the draft conclusion itself.

24. The criteria enunciated in the report for inaction to serve as evidence of acceptance as law received broad support within the Commission. A number of members indicated that the situation should warrant reaction by the States concerned, that States must have actual knowledge of the practice in question and that inaction had to be maintained for a sufficient period of time. Different views were expressed, however, as to whether or not inaction, in that context, was to be equated with acquiescence.

(d) The role of treaties and resolutions

25. A number of members of the Commission expressed support for the conclusion reached in the report on the role of treaties as evidence of customary international law. It was suggested by some members that references to the effect of treaties on the formation of customary rules be set aside and that focus be placed on their evidentiary value exclusively. The view was expressed that, for the purpose of the topic, there was no difference between the crystallization of a customary rule and the generation of a new rule through the adoption of a treaty. Furthermore, it was suggested to address article 38 of the Vienna Convention on the Law of Treaties. Some members stressed that all treaty provisions were not equally relevant as evidence of rules of customary international law and that only treaty provisions of a "fundamentally norm-creating character" could generate such rules.

26. The importance of establishing the criteria for the determination of the relevance of a treaty provision as evidence of a rule of customary international law was highlighted. Some members of the Commission stated that the concept of "specially affected States" was not acceptable, while the view was expressed that the geographical repartition of the parties to a treaty could serve as evidence of the general character of practice.

27. There were a range of views on the evidentiary value of resolutions adopted by international organizations or at international conferences. According to some members of the Commission, such resolutions, and in particular resolutions of the General Assembly of the United Nations, could under certain circumstances be regarded as sources of customary international law. A number of members of the Commission considered that the evidentiary value of these resolutions were in any case to be assessed with great caution. A series of elements to be taken into account, such as the composition of the organization, or the procedure of adoption of the resolution or its object, were highlighted. It was also suggested that the relevance of resolutions adopted at international conferences depended on the participation of States to the conference in question.

28. Members of the Commission generally agreed that resolutions of international organizations and conferences could alone not constitute sufficient evidence of the existence of a customary rule. It was noted that the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. It was pointed out that a separate assessment of whether a rule contained in a resolution was supported by a general practice that is accepted as law (*opinio juris*) was required in order to rely on a resolution (which may, however, serve as evidence for that purpose).

(e) Judicial decisions and writings

29. Members of the Commission welcomed the conclusion according to which judicial decisions and writings were relevant for the identification of rules of customary international law. There was an exchange of views regarding the specific roles played by judicial decisions and writings respectively. It was suggested that they did not bear the same significance and should therefore be dealt with in separate conclusions. It was also noted that their importance could not be addressed generally and should rather be considered on a case-by-case basis.

30. Some members of the Commission emphasized the special importance of judicial decisions, which could not be considered as secondary or subsidiary evidence. The central importance of the International Court of Justice was highlighted by some members, while some others indicated that the case-law of other courts and tribunals could not be overlooked, as well as the role of separate and dissenting opinions of international judges. An exchange of view took place as to the relevance of decisions of national courts. According to some Members, those decisions had to be included within the category of "judicial decision" for the purpose of the identification of rules of customary international law. Some other Members of the Commission, however, considered that such decisions had to be addressed separately and that their role should be assessed with caution.

31. It was suggested that the term "writings" proposed by the Special Rapporteur was too broad and should be qualified more explicitly. Several Members of the Commission also stated that the selection of relevant writings could not amount to preference for writers from specific regions but had to be universal.

(f) The relevance of international organizations

32. There were different views within the Commission as to the relevance of the practice of international organizations. In particular, a number of members of the Commission pointed out that such practice could contribute to the formation or expression of rules of customary international law, and that the importance of the practice of international organizations in some areas had to be emphasized. Some other members stressed that this could be the case only if the practice of an international organization reflected the practice or conviction of its member States or if it would catalyse State practice, but that the practice of international organizations as such was not relevant for the assessment of a general practice.

33. The draft conclusion proposed by the Special Rapporteur that the conduct of other non-State actors was not practice for the purposes of the formation or identification was supported by several members of the Commission. The term "other non-State actors" was considered not to be entirely clear for practitioners since some international organizations were composed by States. Some members of the Commission considered the proposal to be too strict, in particular in the light of the importance of the practice of certain non-State actors, such as the International Committee of the Red Cross, as well as in view of the importance of activities involving both States and non-State actors.

(g) Particular custom

34. A discussion took place regarding the question of particular custom. While a number of members of the Commission supported the draft conclusion proposed by the Special Rapporteur, a view was expressed that the question was to be excluded from the scope of the topic. Questions were also raised regarding the most appropriate terminology to designate such specific category of rules of customary international law, which had been referred to as "regional", "local" or "particular" customs. Moreover, it was suggested to clarify the notion of "region" and to address the question of the geographical nexus between parties to a regional custom.

35. It was stressed that special attention had to be paid to the importance of acquiescence for the identification of particular custom. According to some members, it followed that a stricter standard existed for particular customs rather than universal customs. Some other members, however, indicated that all rules of customary international law were subject to the same conditions.

(h) Persistent objector

36. The persistent objector rule was the subject of wide-ranging debate. Several members supported the inclusion of the rule in the set of draft conclusions, while some other members considered that it was a controversial theory not supported by sufficient State practice and jurisprudence, and which could lead to the fragmentation of international law. It was suggested that concrete examples be provided in the commentary to substantiate the rule, which was largely accepted in the literature.

37. The members of the Commission also discussed extensively the conditions of application of the persistent objector rule, as well as its consequences. Some members indicated that it would be useful to examine the interplay of this rule with obligations *erga omnes* or rules having a peremptory character (*jus cogens*).

(i) Future programme of work

38. As to the future programme of work on the topic, the suggestion by the Special Rapporteur to examine practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined was welcomed. Several members also suggested that the Special Rapporteur study the question of change of customary international law over time, as well as a number of related issues.

39. A number of members of the Commission indicated that sufficient time had to be be allocated for the completion of the work on the topic by the Commission and that the progress on the topic could not be made at the expense of quality.

3. Concluding remarks of the Special Rapporteur

40. The Special Rapporteur emphasized that the aim of the topic was to assist in the determination of the existence or not of a rule of customary international law and its content. That was the task faced by judges, arbitrators and lawyers advising on the law as it existed at a particular time, as opposed to those advising on how the law might develop or be developed. An understanding of how customary rules emerged and evolved nevertheless formed part of the background to the topic and would be addressed in the commentary.

41. On the various questions relating to the interrelationship between the two elements, the Special Rapporteur considered that the temporal aspect of the relationship was more related to the formation of customary rules than to their identification, but was nevertheless an important aspect that needed to be covered in

the commentary. Regarding the application of the two-element approach in different fields, he stressed that regard had to be had to the context in which the evidence arose and that that required a careful evaluation of the factual foundations of each case and their significance. Finally, on the issue of the separate assessment of the two elements, the Special Rapporteur noted the general agreement within the Commission that the determination of a rule of customary international law had to be ascertained separately for each element. The issue referred to at times as "double-counting" proved to be more controversial. On that aspect, the Special Rapporteur clarified that there could be occasions where, exceptionally, the same evidence might be used in order to ascertain the two elements. The important aspect is that both elements needed to be present, and that theories according to which the extensive presence of one element could compensate for the lack of the other were not convincing.

42. The Special Rapporteur considered that the conclusion that the practice of international organizations *as such* was relevant for the purpose of the identification of rules of customary international law was not controversial since it appeared clearly that the practice of international organizations in their relations among themselves, at least, could give rise to customary rules binding in such relations. Such conclusion was also important in the case of international organizations, such as the European Union, exercising competences on behalf of their Member States. That conclusion, which had been recognized in the previous work of the Commission, seemed to be generally accepted by States. The Special Rapporteur stressed that the role of international organizations, despite their importance, was not comparable to that of States. Regarding the role of non-state actors, the Special Rapporteur indicated that such entities might have a role in the formation and identification of rules of customary international law – but through prompting or recording State practice, and not by their own conduct as such.

43. On the role of inaction, the Special Rapporteur indicated that the suggestion that the corresponding paragraph of the draft conclusion needed to reflect the essence of the conditions set forth in the report deserved serious consideration.

44. With respect to the role of treaties in the identification of rules of customary international law, the Special Rapporteur, while acknowledging the importance of multilateral treaties, considered that bilateral treaties could not be excluded from the draft conclusions, even though their impact had to be approached with particular caution. The Special Rapporteur also indicated that the significance of article 38 of the Vienna Convention on the Law of Treaties for the topic would be addressed in the commentary and that the notion of "fundamentally norm-creating character" would be captured therein.

45. The Special Rapporteur noted that the draft conclusion on resolutions of international organizations and conferences had not been particularly controversial within the Commission. He acknowledged that their role could be expressed more positively, even if such resolutions needed to be referred to with caution.

46. The Special Rapporteur indicated that the proposed draft conclusion on judicial decisions and writings needed to be developed further and that the two sources needed to be dealt with in separate draft conclusions. The Special Rapporteur concurred with the view that in reality judicial decisions came into play as part of a single process of determining whether or not a certain customary rule existed. He also recognized that separate and dissenting opinions, while in his view not judicial decisions within the meaning of Article 38 (1) (d), were not without importance for the topic. The Special Rapporteur indicated that by "writings", he was referring to the "writings of jurists". He also pointed out that the benefit of considering the writings of jurists representing different legal systems of the world needed to be reflected in the commentary.

47. On particular custom, the Special Rapporteur confirmed that all the other draft conclusions were applicable to particular custom, including the draft conclusion on treaties, except in so far as draft conclusion 15 provided otherwise. He added that, even if in theory a geographical nexus between the States bound by such rule was not required, it was often called for in practice.

48. The Special Rapporteur noted that draft conclusion 16 on the persistent objector received widespread support and acknowledged that it had be illustrated by reference to practical examples in the commentary. He pointed out that the persistent objector rule could be and not infrequently is raised before judges asked to identify customary international law and that it was therefore important to provide practitioners with guidelines on the matter, and especially to clarify the requirements for a State to become a persistent objector.

49. As to the future programme of work on the topic, the Special Rapporteur indicated that, in the light of all that had been said in the debate, a realistic aim would be to complete a first reading of the draft conclusions and commentaries by the end of the sixty-eighth session (2016). The question would then be how to divide the work between this session and the next one. Given the importance of the commentaries, it seemed appropriate have two stages. First, if the Drafting Committee was able to complete its work this session, and provisionally adopt a complete set of draft conclusions (complete, that is, subject to any additional provisions and suggestions that might emerge from the debate on a fourth report), the Special Rapporteur could then prepare draft commentaries on all the conclusions in time for the beginning of the 2016 session. Members would then have adequate time to consider the draft commentaries carefully, and hopefully the full set of first reading draft conclusions and commentaries could be adopted by the Commission by the end of its 2016 session.